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The Relationship Between Motion Picture Distribution and Exhibition: An Analysis of the Effects of Anti-Blind Bidding Legislation

by SUZANNE ILENE SCHILLER*

I Introduction

Since the late 1940's, the distribution and exhibition arms of the motion picture industry have been independently owned.¹ However, each entity is dependent on the other for survival. Exhibitors, those who own theaters, must license films from distributors and distributors must rely on exhibitors to disseminate their product. Competition for screen space and films with blockbuster potential is particularly keen during the peak seasons — Christmas, summer, and Easter.

The relationship between distributors and exhibitors is often characterized as one of "mutual distrust."² Early on, exhibitors feared the power wielded by the major studios.³ This rivalry for survival and control led to substantial vertical integration within the industry.⁴ But even when ownership was consolidated, battles raged between the two branches with

* Member, Third Year Class; B.A., Bennington College, 1983. The author wishes to thank Mark Schiller, a knowledgeable source, a patient sounding board, and a good friend.

1. Prior to 1948, the major film studios not only produced and distributed films, but also owned and operated the theaters in which their movies were shown. Eventually, the Department of Justice intervened and brought an action against the studios for violation of antitrust laws. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). The dispute was finally settled when the studios agreed to divest themselves of the theaters. See *infra* notes 34-37 and accompanying text. For a thorough analysis of these antitrust actions, see M. CONANT, *ANTITRUST IN THE MOTION PICTURE INDUSTRY* (1960).

2. Myers, *The Studio as Distributor*, in *THE MOVIE BUSINESS BOOK* 275, 281 (J. Squire ed. 1983).

3. Zukor, *Origin and Growth of the Movies (1927)*, in *THE MOVIES IN OUR MIDST* 112, 120 (G. Mast ed. 1982).

4. *Id.* at 120-22; see *infra* note 33 and accompanying text.

exhibition controlling the profits and production/distribution controlling the expenditures.⁵

Today, the conflict remains one of control. Exhibitors want the ability to select films based on their own judgment of what the public wants, but their choices are mostly confined to what is produced by the major studios. The studios meanwhile want to prevent bullying by exhibitors while retaining their freedom to choose the outlets for their products.⁶

One of the latest battles in this continuing rivalry is the practice of blind bidding. Blind bidding is defined as "the offering or bidding for, negotiating for, or agreeing to terms for the licensing or exhibition of a motion picture if the motion picture has not been trade screened within the [local geographic area] before any such event has occurred."⁷ A trade screening is the showing of a motion picture being distributed which is open to any interested exhibitor.⁸ Since 1978, twenty-four states,⁹ Prince George's County, Maryland, and Puerto Rico have enacted statutes which prohibit the licensing of any motion picture prior to its being trade screened for exhibitors. Some of these statutes also regulate bidding procedures, prohibit or limit the payment of guarantees and/or advances, and limit clearances and lengths of first runs, all of which affect distributor-exhibitor relationships.¹⁰

While the anti-blind bidding statutes are intended to equalize

5. Huettig, *The Motion Picture Industry Today* (1944), in *THE MOVIES IN OUR MIDST* 383, 388 (G. Mast ed. 1982). This article is an excellent introduction to the market structure of the film industry just prior to the intervention by the Department of Justice.

6. See Murphy, *Distribution and Exhibition: An Overview*, in *THE MOVIE BUSINESS BOOK* 243, 246-47 (J. Squire ed. 1983).

7. MODEL MOTION PICTURE FAIR COMPETITION ACT art. II, § 9 (National Ass'n of Theater Owners 1977). See also *infra* note 120.

8. See MODEL MOTION PICTURE FAIR COMPETITION ACT art. II, § 8 (National Ass'n of Theater Owners 1977).

9. These states are: Alabama, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine (repealed), Massachusetts, Missouri, Montana, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin.

10. Guarantees and advances are forms of prepayment by the exhibitor. See *infra* notes 47 & 48 and accompanying text. Clearance defines the geographic area in which a particular exhibitor will be the only one screening the film. See *infra* note 46 and accompanying text. A run is the continuous exhibition of a motion picture in a particular area. *Id.*; MODEL MOTION PICTURE FAIR COMPETITION ACT art. II, § 10 (National Ass'n of Theater Owners 1977). A first run is the first exhibition of the film in a specified geographic area. MODEL MOTION PICTURE FAIR COMPETITION ACT art. II, § 10 (National Ass'n of Theater Owners 1977).

the bargaining power between major distributors and exhibitors,¹¹ the positive impact on the industry as a whole seems to be minimal. Indeed, this note argues that those who perhaps need protection the most — the independent distributors and small exhibitors — are more likely to be adversely affected by the statutes.

Part II of this note examines the parties involved and reviews the development and present status of motion picture licensing. Part III traces the history of blind bidding and the attempts to regulate this practice, and Part IV evaluates the effects of modern licensing statutes.

II Background

A. The Players

1. *Distributors*

Motion picture distributors are generally separated into two main categories — majors, who dominate the market, and independents.¹² Since the major distributors have vast financial resources, they also tend to be the major producers of films and, therefore, distributor in reference to these companies is often synonymous with studio. The Motion Picture Association of America (MPAA), a trade association, represents the interests of the major film distributors: Warner Brothers Distributing Corp., Paramount Pictures Corp., Columbia Pictures Industries, Inc., Twentieth Century Fox Film Corp., Universal Pictures Division of Universal City Studios, Inc., MGM/UA Entertainment Co., Inc., Orion Pictures, Inc., and Buena Vista Distribution Co., Inc. (the distribution arm of Walt Disney Studios).¹³ In 1984, these eight distributors plus Avco Embassy Pictures Corp., also considered a major at that time, accounted

11. *Associated Film Distribution Corp. v. Thornburgh*, 614 F. Supp. 1100, 1104 (E.D. Pa. 1985), *on remand from* 683 F.2d 808 (3d Cir. 1982), *rev'g* 520 F. Supp. 971 (D.C. Pa. 1981), *cert. denied*, — U.S. — (1987) [hereinafter *Associated Film Distribution*].

12. See, e.g., Statfeld, *Blind Bidding: or What Should be Playing at the Bijou?*, 11 PERF. ARTS REV. 27 (1981). Originally, "major" distributors were those with the largest market shares. Now however, the term is used loosely to refer to those companies represented by the Motion Picture Association of America. *Id.* at 28. For a discussion of the market structure of distributors, see Conant, *The Paramount Decrees Reconsidered*, 44 LAW & CONTEMP. PROBS. 79, 89-92 (1981).

13. Telephone interview with Anne Grupp, Esq., West Coast Counsel, Motion Picture Association of America (Oct. 21, 1985).

for 88.8 percent of domestic box office revenues.¹⁴ By 1986, however, the majors only garnered eighty-one percent of market rentals.¹⁵

Independent distributors range from small importers of foreign films to larger producers such as Tri-Star Pictures, Inc., Cannon Films, Inc., and New World Pictures, Inc.. In fact, in 1984, Tri-Star garnered 5.2 percent of domestic box office revenues, more than two of the so-called majors, Buena Vista and Embassy.¹⁶ In 1985, Tri-Star's market rentals jumped to ten percent. While they came down to seven percent in 1986, this percentage is still much larger than MGM/UA's four percent.¹⁷

2. Exhibitors

Exhibitors are represented by two trade associations — the National Association of Theater Owners (NATO) and the newer National Independent Theatre Exhibitors (NITE). Exhibitors range in size from large conglomerates, such as General Cinema Corporation, which owns over 1,000 screens and has interests in soft drink bottling plants and Carter Hawley Hale Stores,¹⁸ to single screen art houses. The ten largest theater chains, or circuits, usually account for fifty percent of a major distributor's income in any given year.¹⁹ Furthermore, unlike the distribution side of the industry, exhibition is expanding. The number of screens was expected to grow overall by 7.4 percent in 1985,²⁰ with some companies projecting an increase of over ten percent.²¹ Theaters are also retaining a

14. Murphy, *Warners Noses Par in B.O. Race*, Daily Variety, Jan. 4, 1985, at 1, col. 4.

15. Murphy, *Northern American Theatrical Market Shares: 1970-1986*, Daily Variety, Jan. 14, 1987, at 58, col. 3 (chart). Embassy Pictures is not included in recent figures because the company was bought by Columbia Pictures in 1985 and the distribution arm was sold to Dino DeLaurentis. *Id.* Additionally, film rental figures vary slightly from the box office revenue figures, but in 1986 the difference was minimal. See *Final 1986 Domestic B.O. Market Shares*, Daily Variety, Jan. 6, 1987, at 1, col. 3 (chart).

16. Murphy, *supra* note 14. Buena Vista garnered only 4.2% of the box office and Embassy a mere .3%.

17. Murphy, *supra* note 14.

18. General Cinema Corp., 52 STANDARD NYSE STOCK REPORTS, No. 117, Sec. 9 (June 18, 1985).

19. Myers, *supra* note 2, at 276.

20. Cieply, *U.S. May Soon Allow Film Studios to Own Domestic Movie Theaters*, Wall St. J., Dec. 7, 1984, at 25, col. 4.

21. United Artists Communications, 51 STANDARD OTC STOCK REPORTS, No. 60, Sec. 32 (May 24, 1985) ("... the company said it would add [to its present number of 1,057] 100 to 150 new movie screens in fiscal 1985."). The number of screens continues

larger share of box office revenues²² and the increased number of film releases and larger concessions sales are expected to improve their profits.²³

B. Licensing Practices

1. History

When filmmaking first developed, films were relatively short and inexpensive to produce. The most economical and efficient way to exhibit films was to sell prints directly to theaters.²⁴ The cost was usually determined by the total length of the film, measured in feet.²⁵

Changes occurred as films grew in length, and audiences soon demanded films featuring particular stars such as Mary Pickford or Charlie Chaplin.²⁶ These acknowledged stars realized their true worth and demanded higher salaries and more control over the pictures they worked on.²⁷ Second, the studio system, whereby actors, directors, and other participants worked under contract for a particular studio, began to develop and crystallize.²⁸ Studios committed themselves to paying regular salaries regardless of whether their employees were actually working on a particular film. These factors combined to increase the costs of making a motion picture,²⁹ and the methods for exhibiting films changed to accommodate this development.

The first change took place around 1915 when distributors switched from selling a print outright to licensing or renting it.³⁰ When a print is sold outright to an exhibitor it may be displayed and used without limitation. Under a licensing scheme, a distributor retains ownership of the actual print and the exhibitor's use of the print is limited by contract.³¹

to grow. See Tusher, *UA New King of Exhibition Hill*, *Daily Variety*, Jan. 6, 1987, at 1, col. 4.

22. Murphy, *Distributors' B.O. Share Below 40%*, *Daily Variety*, Aug. 21, 1984, at 1, col. 5.

23. See *supra* note 18 ("Improved cost structures resulting from increased film releases and higher per-capita concession sales should enhance theatre profits.").

24. J. ELLIS, *A HISTORY OF FILM* 74 (2d ed. 1985).

25. *Id.* See also Murphy, *supra* note 6, at 244.

26. J. ELLIS, *supra* note 24, at 74.

27. *Id.* at 71, 135.

28. *Id.* at 179.

29. *Id.* at 135.

30. Murphy, *supra* note 6, at 244.

31. Mayer, *The Exhibition License*, in *THE MOVIE BUSINESS BOOK* 338, 339 (J. Squire ed. 1983).

The other major change to take place was the vertical integration of the industry.³² Theater owners such as William Fox began to produce their own films, and studio owners such as Adolph Zukor of Paramount began to buy theaters to exhibit the films they were making.³³ When these companies grew too large, exhibitors not affiliated with any studio were crowded out of the business. Finally, in 1948, the Department of Justice brought suit. In *United States v. Paramount Pictures*,³⁴ the United States Supreme Court affirmed a district court's order ruling several of the major studios' trade practices illegal. It then remanded the case to the district court to consider the possibility of divesting major studios from their theater ownership. The district court concluded that the divorce of exhibition from production and distribution was the proper remedy.³⁵ Prior to the district court's order, several studios had already consented to divestment; the court's order also was effectuated by consent decrees³⁶ entered into between the Department of Justice and the individual studios.³⁷

In the thirty-five years since the divorce of theaters and studios, licensing has developed even further. Initially, distributors received from exhibitors a fixed percentage of box office gross revenues.³⁸ This percentage ranged from fifteen percent to twenty-five percent, and was often dependent on the quality of the film and the star or stars featured.³⁹ Later license fees

32. In this context, vertical integration is the ownership by one company of the production, distribution, and exhibition functions. By the late 1940's, five studios were fully integrated. Murphy, *supra* note 6, at 247.

33. Murphy, *supra* note 6, at 246-47. For a truly unique and first-hand view of the development of the vertical integration of the film industry, see Zukor, *supra* note 3 at 119-22.

34. 334 U.S. 131, 161-66 (1948).

35. *United States v. Paramount Pictures, Inc.*, 85 F. Supp. 881, 897 (S.D.N.Y. 1949), *aff'd* 339 U.S. 974 (1950).

36. Consent decrees are agreements by the defendants to refrain from practices alleged to be illegal by the government. BLACK'S LAW DICTIONARY 370 (5th ed. 1979).

37. These consent decrees were: *United States v. Paramount Pictures, Inc.*, 1948-9 Trade Cas. (CCH) ¶ 62,335 (S.D.N.Y. 1948) (entered into by RKO); *United States v. Paramount Pictures, Inc.*, 1948-9 Trade Cas. (CCH) ¶ 62,377 (S.D.N.Y. 1949) (entered into by Paramount); *United States v. Loew's, Inc.* 1950-1 Trade Cas. (CCH) ¶ 62,765 (S.D.N.Y. 1951) (entered into by Warner Bros.); *United States v. Loew's, Inc.* 1950-1 Trade Cas. ¶ 62,861 (S.D.N.Y. 1951) (entered into by Twentieth Century-Fox); *United States v. Loew's, Inc.* 1952-3 Trade Cas. (CCH) ¶ 62,228 (S.D.N.Y. 1952) (entered into by Loew's).

38. *Associated Film Distribution*, 614 F. Supp. at 1103.

39. Murphy, *Some Comments on the Evolution of the 90/10 Licensing Format* (Dec. 9, 1984) (unpublished manuscript). See also Murphy, *supra* note 6, at 244.

were based on a sliding scale term whereby the percentage that distributors received grew in proportion to the weekly box office gross.⁴⁰

2. *Present Licensing Terms*

The prevailing percentage split between distributors and exhibitors is known as the 90/10 format.⁴¹ Under this arrangement, the distributor receives ninety percent of the box office receipts after the house allowance, or nut, is deducted.⁴² The house allowance is, theoretically, equal to the theater's operating expenses. However, this term is now negotiable and generally considered to include some built-in profit.⁴³ Most contracts also contain a provision for a floor, a minimum fixed percentage of the box office gross which will be paid to the distributor.⁴⁴

Typical floors for a major, first-run release are seventy percent for the first few weeks, sixty percent for the next, and so on.⁴⁵ For example, in a contract which provides for a house allowance of \$5,000 and a seventy percent floor, if the box office takes in \$20,000, the distributor will receive \$14,000 and the exhibitor will keep \$6,000. If there were no floor, the exhibitor would receive his house allowance of \$5,000 plus ten percent of the remaining \$15,000 or \$1,500. The distributor would receive only \$13,500.

Other common contract terms define the length of time the film will play in a particular theater (the run), and the geographic area in which an exhibitor retains an exclusive license (the clearance).⁴⁶ Provisions are also made for guarantees, non-refundable deposits paid by exhibitors prior to the start of the run,⁴⁷ and advances, deposits paid by exhibitors which are refundable if the distributor's share is less than the amount paid.⁴⁸

40. *Associated Film Distribution*, 614 F. Supp. at 1103.

41. Murphy, *supra* note 6, at 244, 253; Fellman, *The Exhibitor*, in *THE MOVIE BUSINESS BOOK* 313, 315 (J. Squire ed. 1983); Note, *Blind Bidding and the Motion Picture Industry*, 92 HARV. L. REV. 1128, 1131 n.15 (1979).

42. Fellman, *supra* note 41, at 315.

43. Murphy, *supra* note 6, at 253.

44. Fellman, *supra* note 41, at 317; Murphy, *supra* note 6, at 245.

45. Murphy, *supra* note 6, at 245.

46. Fellman, *supra* note 41, at 315.

47. *Associated Film Distribution*, 614 F. Supp. at 1105.

48. *Id.*

Finally, while the distributor pays the cost of national advertising, the cost of regional advertising is often shared between the distributor and exhibitor.⁴⁹ Typically, exhibitors pay either a flat fee or a proportionate share based on the actual box office percentages.⁵⁰ In the example above (where there is no floor, the house allowance is \$5,000 and the box office takes in \$20,000), the distributor would pay 67.5 percent of the local advertising costs. The exhibitor would pay 32.5 percent, the exhibitor's take of \$6,500 being 32.5 percent of the \$20,000 gross receipts.

3. *Economic Effects*

Because licensing terms and economics are often identified as the cause of dissension between distributors and exhibitors, it is instructive to examine how present licensing practices affect their relationship.⁵¹ There appears to be only two scenarios in which the exhibitor will fail to make a profit. The first occurs when an exhibitor puts up a large guarantee which is not matched by the the box office proceeds owed to the distributor. Thus, under the previous example, if the exhibitor had paid a guarantee of \$16,000, he would retain only \$4,000, less than his assumed house expense of \$5,000. While it is unknown how often this actually occurs, one studio executive estimated that unearned guarantees, the excess revenue made by the distributor when his share of the box office receipts does not equal or exceed the amount guaranteed by the exhibitor, accounted for less than one percent of total film rentals.⁵² In Pennsylvania, unearned guarantees accounted for 4.3 percent of the major distributors' rental income during unregulated periods.⁵³ On a particularly successful film, however, the exhibitor can make back these payments in the first day or week of the run.⁵⁴

The other instance in which an exhibitor loses money occurs when the exhibitor's share of the box office revenues are less than the house allowance. For example, if there is a 90/10 split, seventy percent floor, \$5,000 house allowance, and box office

49. See, e.g., Myers, *supra* note 2, at 280.

50. Durwood & Resnick, *The Theatre Chain: American Multi-Cinema*, in THE MOVIE BUSINESS BOOK 327, 331 (J. Squire ed. 1983).

51. See, e.g., Allied Artists Pictures Corp. v. Rhodes, 496 F. Supp. 408, 415 (S.D. Ohio 1980) *aff'd in part, remanded in part* 679 F.2d 656 (6th Cir. 1982).

52. Myers, *supra* note 2, at 282.

53. *Associated Film Distribution*, 614 F. Supp. at 1110.

54. Murphy, *supra* note 6, at 246.

revenues of only \$15,000, the seventy percent floor will be activated and the exhibitor will receive only \$4,500. However, once box office receipts reach \$16,666.67, the exhibitor will retain more than his operating expenses regardless of whether or not the floor is activated.

When concession sales are taken into account, the exhibitor will often make more than his operating expenses even if box office receipts are below this critical figure. Concession sales comprise approximately thirty-five percent of the exhibitor's total receipts⁵⁵ and seventy to eighty percent of that figure represents profit over the food costs.⁵⁶ No part of this is paid to the distributor, despite the fact that it is the distributor's film which attracts the popcorn-hungry audience.

A distributor's profit is not as certain as an exhibitor's profit. The estimated average cost of producing and distributing a first-run motion picture may be as high as \$20 million.⁵⁷ Only two out of ten films break even or turn a profit.⁵⁸ Additionally, while the exhibitor's return is almost immediate, the distributor/producer begins making his investment years before a film's release. Guarantees and advances are rarely, if ever, payable more than a couple of weeks before the film opens.⁵⁹ Merely the interest on the funds borrowed to make a film can be staggering.⁶⁰ Furthermore, exhibitors have been known to underreport box office gross receipts⁶¹ or hold receipts until after they are due,⁶² thus reducing distributor profits even further.

55. Murphy, *supra* note 22, at 13, col. 1.

56. Lowe, *Refreshment Sales and Theatre Profits*, in *THE MOVIE BUSINESS BOOK*, 343, 345 (J. Squire ed. 1983).

57. *Associated Film Distribution*, 614 F. Supp. at 1104.

58. Myers, *supra* note 2, at 283.

59. Murphy, *supra* note 6, at 246.

60. It has been estimated that the interest on *Heaven's Gate*, a 1979 release, was \$14 million by March 1980. 1 T. SELTZ & M. SIMENSKY, *ENTERTAINMENT LAW* § 2-4 (1983) (citing Harmetz, *Coppola: Will He Break Even?*, *NY Times*, Mar. 18, 1980, at C7). The interest on *Close Encounters of a Third Kind*, which cost \$22 million, was approximately \$200,000 per month. MOTION PICTURE ASS'N OF AMERICA, *BLIND BIDDING OF MOTION PICTURES* 13 (1981), *reprinted in* National Association of Theater Owners, *Blind Bidding Position Paper* 12 (available from NATO, 1560 Broadway, New York, NY 10036 [hereinafter NATO position paper], (1981).

61. See, e.g., *Theater Operators Facing Suit By Eight Distributors*, *Daily Variety*, March 7, 1985, at 4, col. 1; *WB To Exhibs: Report B.O. Accurately or Lose Films*, *Daily Variety*, May 13, 1985, at 1, col. 1; *D.A.'s Showbiz Task Force Accuses Kurstin Theaters of Under-Reporting B.O.*, *Daily Variety*, May 21, 1985, at 1, col. 1; Myers, *supra* note 2, at 283.

62. See Myers, *supra* note 2, at 282.

4. *Licensing Methods*

There are two methods of licensing a motion picture.⁶³ Until very recently, the most common method was bidding.⁶⁴ Under this process, a distributor sends out a bid solicitation to all exhibitors in a given geographic area.⁶⁵ These invitations to bid typically describe the picture and may include names of the stars and director, as well as the available date and suggested terms.⁶⁶ Exhibitors then submit their bids. While the 90/10 format is almost always firm,⁶⁷ advances, guarantees, clearances, and runs are all generally negotiable. The distributor makes his decision as to which exhibitor will receive the license based on these factors, the size and location of the theater as well as other, more intangible, factors.⁶⁸

The other method of licensing is negotiation, wherein the distributor directly contacts one specific exhibitor to construct a mutually agreeable licensing contract.⁶⁹ Due to the lack of competition, negotiation usually results in lower terms for the distributor and, while bid terms are understood to be firm,⁷⁰ negotiated terms are considered maximums and can be lowered if the film is not as successful as predicted.⁷¹ Generally, negotiation will be used when there is little or no competition among exhibitors,⁷² insufficient time before the release date to bid a film,⁷³ or following a round of bidding in which the distributor receives bids which he feels are unacceptable.⁷⁴ When the distributor chooses to deal with some, but not all, exhibitors in a particular area, he will utilize competitive negotiation, thereby playing one exhibitor off another.⁷⁵

63. *Associated Film Distribution*, 614 F. Supp. at 1103.

64. *See* Durwood & Resnick, *supra* note 50, at 330.

65. *See* Fellman, *supra* note 41, at 315.

66. *Id.*

67. *Id.*

68. *Associated Film Distribution*, 614 F. Supp. at 1110. *See also* Plaintiff's Trial Brief at 18-20, *Associated Film Distribution*.

69. *Associated Film Distribution*, 614 F. Supp. at 1103.

70. *Id.*

71. *Id.*; Plaintiff's Trial Brief at 25, *Associated Film Distribution*.

72. *Associated Film Distribution*, 614 F. Supp. at 1103.

73. Bidding can take from two to four weeks. *See* telephone interview, *supra* note 13.

74. *Associated Film Distribution*, 614 F. Supp. at 1103.

75. *Id.*

5. *Controversial Licensing Practices*

Over the years, distributors and exhibitors have found various ways of gaining an edge in their dealings with each other.⁷⁶ As described below, these practices include block booking, four-walling, product splitting, and relationships.

The most common of these practices was block booking,⁷⁷ whereby a distributor licensed one or more potentially successful films to a particular exhibitor in exchange for an express promise by that exhibitor to play other less profitable films as well.⁷⁸ This practice was outlawed by the consent decrees entered into in the late 1940's.⁷⁹

Another less common practice is four-walling. When a film is four-walled, rather than licensing the film, the distributor leases the theater from the exhibitor.⁸⁰ Arguably, this violates the consent decrees as it is the exhibition of a motion picture by a distributor.⁸¹ However, at the present time, four-walling appears to be an acceptable form of licensing.⁸² Indeed, as one commentator has suggested, four-walling on a limited basis may be beneficial to the industry because the risks are shifted entirely away from the exhibitor and onto the distributor, who is in a better position to evaluate the profitability of the film.⁸³

More recently, however, exhibitors have been flexing their bargaining muscles. The most popular of the practices initiated by exhibitors is known as product splitting. A split occurs when the exhibitors in a certain geographic area agree to allocate upcoming motion pictures among themselves.⁸⁴ Competition for each film is reduced, thereby lowering the distributor's negotiating power and lowering his terms.⁸⁵ Other problems splits create for distributors include lower guarantees and ad-

76. See generally *Loew's Inc. (1939)*, in *THE MOVIES IN OUR MIDST* 392, 299-402 (G. Mast ed. 1982).

77. Lazarus, *Distribution: A Disorderly Dissertation*, in *THE MOVIE BUSINESS BOOK* 301, 305-06 (J. Squire ed. 1983).

78. Fellman, *supra* note 41, at 321; Conant, *supra* note 7, at 97.

79. See *supra* note 37.

80. Conant, *supra* note 12, at 96.

81. *United States v. Warner Bros. Pictures, Inc.*, 1979-1 Trade Cas. (CCH) ¶ 62,504 (S.D.N.Y. 1976) (Warner Bros. was charged with four-walling in violation of the decrees and agreed not to block book for ten years).

82. See, e.g., Statfeld, *supra* note 12, at 30; Fellman, *supra* note 41, at 321.

83. Conant, *supra* note 12, at 96.

84. Fellman, *supra* note 41, at 320-21; Note, *Motion Picture Split Agreements: An Antitrust Analysis*, 52 *FORDHAM L. REV.* 159 (1983).

85. Note, *supra* note 84, at 160; Myers, *supra* note 2, at 282.

vances⁸⁶ and the playing of a particular type of film in an inappropriate theater.⁸⁷

Early decisions involving splits tended to condone the practice.⁸⁸ However, in April 1977, the Department of Justice announced that it considered splits to be in violation of the antitrust laws⁸⁹ and in 1983 the government prevailed in a product splitting suit against several Milwaukee exhibitors.⁹⁰ Despite all of these restrictions, agreements not to compete allegedly continue to be made since exhibitors cannot be forced to bid.⁹¹

The most recent development in licensing arrangements is the emergence of relationships. Through these relationships, exhibitors commit their screens to certain favored distributors.⁹² With the decline of bidding and the increasing reliance on negotiation, these relationships are becoming a dominant factor in motion picture licensing.⁹³ In fact, even if a distributor decides to put a film out for bids, he may accept a seemingly high bid from a favored exhibitor and then negotiate down the terms⁹⁴ or give the exhibitor a sneak or "five o'clock" look at the competitors' bids so that the exhibitor can make a slightly better offer.⁹⁵ While many factors such as theater location and seating capacity affect a distributor's decision to accept or reject a bid and distributors are not bound to accept the "best"

86. Robbins, *Distributors, Exhib 'Marriages' Increase as Bidding Dries Up*, Daily Variety, July 17, 1985, at 3, col. 3.

87. *Id.* For example, a sensitive film would probably fare better in an intimate setting while an action-adventure would require the impact of a large screen and high quality sound.

88. Conant, *supra* note 12, at 103-06 (citing Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135 (4th Cir. 1980); Viking Theater Corp. v. Paramount Film Distrib. Corp., 320 F.2d 285 (3d Cir. 1963), *aff'd per curiam*, 378 U.S. 123 (1964); Seago v. North Carolina Theaters, Inc., 42 F.R.D. 267 (N.C. 1967), *aff'd per curiam*, 388 F.2d 987 (4th Cir. 1967), *cert. denied*, 390 U.S. 959 (1968); Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17 (9th Cir. 1971)).

89. United States Dep't of Justice Press Release, Apr. 1, 1977, at 2; Cieply, *supra* note 20.

90. United States v. Capitol Service, Inc., 568 F. Supp. 134 (D. Wis. 1983), *aff'd* 756 F.2d 502 (7th Cir.), *cert. denied* 106 S.Ct. 311 (1985).

91. Robbins, *supra* note 86. Furthermore, the Department of Justice is continuing to conduct an in-depth investigation into the issue of product splitting and has indicted many large theater chains. *JD Product-Splitting Probe May Touch all U.S. Circuits*, L.A. Daily J., June 30, 1986, at 1, col. 1.

92. *Associated Film Distribution*, 614 F. Supp. at 1106, 1107 n.8.

93. Robbins, *supra* note 86.

94. *Associated Film Distribution*, 614 F. Supp. at 1106.

95. *Id.* See also *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 430.

bid, they usually do accept the highest bid⁹⁶ and any appearance of impropriety or collusion at the bidding stage is likely to engender legal action by competitors.

There are several benefits to distributor/exhibitor relationships. Distributors are guaranteed screens for their films, thereby stabilizing release patterns.⁹⁷ Exhibitors are guaranteed films at a lower, noncompetitive price.⁹⁸ However, the impact on independent exhibitors is adverse. Independent distributors and exhibitors are caught in the middle because they do not wield the same market power as larger companies. These distributors claim that theaters are unavailable for their films and exhibitors argue that they are effectively denied access to the more successful films.⁹⁹

In retaliation, several smaller entities have filed legal actions alleging that these relationships constitute violations of the antitrust laws.¹⁰⁰ In the first of these suits to be decided,¹⁰¹ a directed verdict was entered against the plaintiff, a small exhibitor.¹⁰²

III Blind Bidding

A. Introduction

Against the backdrop of these past and present licensing practices and abuses is the issue of blind bidding, which is the forcing of an exhibitor to bid on a film without having seen it. Since the late 1970's, most distributors have blind bid the majority of their films.¹⁰³ Prior to the recent surge in anti-blind

96. Fellman, *supra* note 41, at 315.

97. Robbins, *supra* note 86 ("[Distributors] are guaranteed playing time for their pix and the release patterns are stable and consistent").

98. *Id.* ("... the distribution presidents at the top film companies agree that as bidding goes out the window, so goes the competition that normally yields better terms and higher guarantees and advances").

99. See Cieply, *supra* note 20.

100. See Robbins, *supra* note 86; *In re Motion Picture Licensing Anti-Trust Litigation*, 468 F. Supp. 837 (Jud. Pan. Mult. Lit. 1979) (order granting motion to consolidate). Other allegations include blind bidding, block booking, product splitting, term and admission price fixing, and unreasonable clearances.

101. *Universal Amusement Co. v. General Cinema*, 635 F. Supp. 1505 (S.D. Tex. 1985) (action by Universal Amusement Co. and its subsidiary Entertainment Projects against several major distributors and exhibitors alleging violations of the Sherman Antitrust Act).

102. Tusher, *Exhib Loses Anti-Trust Action*, *Daily Variety*, Oct. 7, 1985, at 1, col. 4.

103. *Associated Film Distribution*, 614 F. Supp. at 1104.

bidding legislation, invitations to bid were sent out approximately one year in advance of the film's anticipated release date.¹⁰⁴ Since these films had not yet been completed, exhibitors were asked to bid on films they could not see.

B. Benefits and Burdens

Distributors have offered several reasons for the continuance of blind bidding. First, the ability to reserve screen space as far as a year in advance guarantees the distributor good theaters during the peak seasons.¹⁰⁵ Second, blind bidding saves investors money because it shortens the delay between the production and release of a film.¹⁰⁶ Third, blind bidding allows a distributor to capitalize on the timeliness of the subject matter of his film.¹⁰⁷ Finally, the distributor can effectively plan and build his promotion for a film.¹⁰⁸

Exhibitors, on the other hand, believe blind bidding is intolerable for two main reasons. First, they do not have the opportunity to make a valid business judgment on the merits of a particular film and must commit screen time to a film they have not seen.¹⁰⁹ Second, exhibitors allege that many bid solicitations are misleading and fraudulent, thereby causing exhibitors to bid high on films that do not live up to their advance billing.¹¹⁰

C. Regulation

The federal government has limited blind bidding on three separate occasions. In 1940, the five major studios entered into a consent decree with the Department of Justice which prohibited blind bidding for a period of two years.¹¹¹ Under the consent decrees of the late 1940s and early 1950s, exhibitors were permitted to reject twenty percent of the films they licensed

104. *Id.* at 1107.

105. *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 417; Note, *supra* note 41, at 1132.

106. *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 416.

107. *Id.*

108. *Id.*

109. See generally NATO Position Paper, *supra* note 60.

110. *Id.* at 2-3; *Associated Film Distribution*, 614 F. Supp. at 1107.

111. *United States v. Paramount Pictures, Inc.*, 1940-3 Trade Cas. (CCH) ¶ 56,072 (S.D.N.Y. 1940) (action by the Justice Department against Loew's (MGM), Paramount, R.K.O., Twentieth Century-Fox and Warner Bros.). The decree could have prevented blind bidding indefinitely if similar decrees had been obtained from other distributors. *Id.*

through blind bidding.¹¹² A new decree was entered into in 1968 which limited the number of films a major distributor could blind bid to three per year.¹¹³ The 1968 decree expired in 1975.¹¹⁴ When the 1968 decree was not renewed, the states picked up where the federal government left off. Since 1978, modern regulation of blind bidding has originated from state legislatures.¹¹⁵

There are several possible reasons for the popularity of anti-blind bidding legislation. The most obvious is that, with the expiration of the 1968 decree, blind bidding rapidly became the most popular method of licensing. By 1977, the major distributors were blind bidding sixty to ninety-one percent of their films.¹¹⁶ Second, exhibitors justifiably fear the weakening of the 1948 consent decrees. Claims have been made that the Department of Justice has let monopolistic practices outlawed by the decrees go unchecked for the last ten years.¹¹⁷ Third, it was

112. See *supra* note 37.

113. *United States v. Paramount Pictures, Inc.*, No. 87-273 (S.D.N.Y., filed Aug. 14, 1968; renewed Jan. 1, 1971).

114. *Id.*

115. See *supra* note 9 and accompanying text.

116. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 417.

117. Tusher, *Exhibs Charge Justice Soft on Consent Decrees*, Daily Variety, Jan. 16, 1985, at 1, col. 2. Examples of the erosion of the decrees include a 1981 investigation by the Department of Justice into the possible termination or modification of the decrees. In February 1985, the Department decided not to take any action but stated that its inaction was not meant to suggest it would oppose any future efforts on the part of the original defendants to terminate the decrees. 6 ENTERTAINMENT L. REP. vol. 9 at 21 (Feb. 1985). Additionally, some recent decisions have held that a private plaintiff cannot sue to enforce the consent decrees against the signatories as they are not considered third party beneficiaries. See, e.g., *Cinema Service Corp. v. 20th Century-Fox Film Corp.*, 477 F. Supp. 174, 177 (1979). As early as 1977, General Cinema was considering investing some \$26 million in Columbia-produced and distributed motion pictures. This deal was eventually dropped in the aftermath of the discovery that Columbia Pictures President David Begelman was embezzling funds from the company and Columbia's reinstatement of Begelman as President. D. MCCLINTICK, *INDECENT EXPOSURE* 193-95, 381 (1982). Non-signatories have begun to enter the exhibition field. Recently, Samuel Goldwyn Company opened a multiplex theater in a West Los Angeles shopping mall. Samuel Goldwyn Company Press Release (1985). Tri-Star has announced plans to purchase United Artists Communications, Inc., one of the largest exhibitors in the country. Girard, *Tri-Star has Exhibition Plans*, Daily Variety, July 15, 1986, at 1, col. 4. The Department of Justice is "monitoring" this trend. However, it has not found any antitrust violations. Tusher, *JD Monitoring Circuit Takeovers*, Daily Variety, July 31, 1986, at 1, col. 4. See also Cieply, *supra* note 20. It appears that NATO no longer opposes such mergers. *NATO Withdraws Opposition to Distribs Buying Circuits*, Daily Variety, Aug. 12, 1986, at 1, col. 4. Finally, a recent New York District Court judge held that "Warner Bros. exploration of opportunities for theater acquisition would not be in violation of the Paramount consent decrees." *Court Okays Warner Move Into Exhib'n*, Daily Variety, Sept. 11, 1986, at 1,

in 1977 that the Department of Justice announced that product splitting was a per-se violation of the antitrust laws.¹¹⁸ Exhibitors, enraged at the federal government's interference with what they believed to be a legal licensing practice,¹¹⁹ promptly fought back in an attempt to regain some of the bargaining power lost by this decision. In 1977, the National Association of Theater Owners drafted a model bill intended to halt blind bidding.¹²⁰ Since most distributors are located in New York and California, legislators in other states were receptive to this call

col. 3. This appears to be the first time an actual Paramount defendant has investigated reentering exhibition. Because of this, 1986 has been called a year in which "the motion picture industry returned to the origins of its pre-television growth and prosperity in the most massive marriage of distribution and exhibition since the 1948 Paramount Consent Decrees. . . ." Tusher, *Distribs Pursue Circuit-Buying With a Passion*, Daily Variety, Jan. 5, 1987, at 1, col. 3.

118. See *supra* note 89 and accompanying text.

119. See, e.g., Cieply, *supra* note 20 ("Tell the Justice Department, damn it, to get the hell out of our business — we're not doing anything illegal" fumed Joel Resnick, an AMC Entertainment executive vice president. . . .").

120. *Supra* note 7. The model bill provides in pertinent part:

Article I — Purpose

The purpose of this Act is to establish fair and open procedures for the licensing of motion pictures within the State; prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the State; promote fair and effective competition in that business; and benefit the movie-going public by holding down admission prices to motion picture theatres; expanding the choice of motion pictures available to the public, and preventing exposure of the public to objectionable or unsuitable motion pictures by ensuring that exhibitors have the opportunity to view a picture before committing themselves to exhibit it.

....

Article III — Blind Bidding

1. Blind bidding is hereby prohibited within the State. No offer or bid shall be made or accepted, no negotiation for the exhibition or licensing of a motion picture shall take place, and no license agreement or any of its terms shall be agreed to, for the exhibition of any motion picture within the State before the motion picture has been trade screened within the State.

2. Every distributor shall provide reasonable and uniform notice to exhibitors within the State of all trade screenings within the State of motion pictures he is distributing.

3. Any purported waiver of the requirements of this Article shall be void and unenforceable.

Article IV — Guarantees

1. No distributor shall condition the granting or execution of a license agreement which provides for a fee or other payment to the distributor based in whole or in part on the attendance or the box office receipts at a theatre within the State on a guarantee of a minimum payment to the distributor. No distributor shall solicit, request, or suggest such a guarantee.

2. Any purported waiver of this prohibition in paragraph 1 of the Article shall be void and unenforceable.

Article V — Advances

for help from the exhibitors, their local constituents. The first state anti-blind bidding statute was enacted in April, 1978.¹²¹

1. No distributor shall condition the granting or execution of a license agreement for the exhibition of a motion picture at a theatre within the State on the exhibitor advancing more than seven days prior to his first exhibition of the motion picture any funds as security for the performance of the licensing agreement or to be applied to payments under the licensing agreement. No distributor shall solicit, request, or suggest such an advance.

2. Any purported waiver of this prohibition in paragraph 1 of the Article shall be void and unenforceable.

Article VI — Bidding Procedures

If a distributor solicits, requests or invites (whether directly to one or more exhibitors or by a general announcement or advertisement or in any other manner) an offer from more than one exhibitor to license a motion picture in a particular geographic market for the same run, then, as to that picture in the market:

1. The distributor shall inform each exhibitor whom he solicits, requests or invites to make an offer, or who communicates an interest in making an offer: (a) the number and length of runs for which the picture will be licensed, whether it is a first, second, or subsequent run, and the geographic area for each run; (b) the names of all exhibitors who are being solicited to make an offer; (c) the date and hour by which offers must be submitted; and (d) the address where and time when the offers will be opened, which shall be within the State.

2. All offers shall be in writing and shall be opened at the same time and in the presence of any exhibitor, or his agent, who submitted an offer and is present at such time.

3. After being opened, offers shall be subject to examination by exhibitors who submitted offers, or their agents, for twenty-one (21) business days. Within seven (7) business days after a motion picture is licensed, the distributor shall notify in writing each exhibitor who submitted an offer of the terms of the license agreement and the name of the exhibitor to whom the picture has been licensed.

4. Once a distributor solicits, requests or invites (whether directly to one or more exhibitors or by a general announcement or advertisement or in any other manner) an offer from more than one exhibitor to license a motion picture in a particular geographic market for the same run, then the distributor shall license that picture in that market only through the procedures specified in paragraphs 1, 2 and 3 of this Article, and the distributor may solicit re-offers if he does not accept any of the submitted offers.

121. ALA. CODE §§ 8-18-1 to 8-18-6 (1984). The statute provides in pertinent part:

§ 8-18-1. *Short Title.*

This chapter shall be known as the "Alabama Motion Picture Fair Competition Act."

§ 8-18-3. *Legislative Intent.*

The intent of this chapter is to establish fair and open procedures for the bidding and negotiation for the right to exhibit motion pictures within the state in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the state, to promote fair and effective competition in that business and to ensure that exhibitors have the opportunity to view a motion picture and

The major difference between this new wave of legislation and the prior limitations on blind bidding is that this current movement is occurring at the state and local levels rather than at the federal level. This is particularly important in assessing the effects of the statutes since variations between states may increase the burdens imposed on distributors.

However, the federal government may not be out of the picture just yet. There are several suits now pending in federal courts, brought by exhibitors, alleging various antitrust violations.¹²² Blind bidding is one of the practices at issue which the

know its contents before committing themselves to exhibiting it in their municipalities or towns.

§ 8-18-4. Blind bidding prohibited; notice of trade screening required.

(a) Blind bidding is hereby prohibited within the state. No bids shall be returnable, no negotiations for the exhibition or licensing of a motion picture shall take place and no license agreement or any of its terms shall be agreed to, for the exhibition of any motion picture, before the motion picture has either been trade screened or before such motion picture, at the option of the distributor, otherwise has been made available for viewing by all exhibitors from whom the distributor is soliciting bids or with whom the distributor is negotiating for the right to exhibit the motion picture.

(b) A distributor shall provide reasonable and uniform notice of the trade screening of any motion picture to those exhibitors from whom he intends to solicit bids or with whom he intends to negotiate for the right to exhibit that motion picture.

(c) Any purported waiver of the prohibition against blind bidding in this chapter shall be void and unenforceable.

§ 8-18-5. Bidding procedures.

(a) If bids are solicited from exhibitors for the licensing of a motion picture within the state, then:

(1) The invitation to bid shall specify:

- a. Whether the run for which the bid is being solicited is a first, second or subsequent run; whether the run is an exclusive or nonexclusive run; and the geographic area for the run;
- b. The names of all the exhibitors who are being solicited;
- c. The date and hour the invitation to bid expires; and
- d. The time, date and the location, including the address, where the bids will be opened.

(2) All bids shall be submitted in writing and shall be opened at the same time and in the presence of those exhibitors, or their agents, who submitted bids and are present at such time.

(3) Immediately upon being opened, the bids shall be subject to examination by exhibitors, or their agents, who submitted bids, and who are present at the opening. Within 10 business days after the bids are opened, the distributor shall notify each exhibitor who submitted a bid either the name of the winning bidder or the fact that none of the bids were acceptable.

(b) Once bids are solicited, the distributor shall license the picture only by bidding and may solicit rebids if he does not accept any of the submitted bids.

....

122. See *supra* note 100.

exhibitors allege to be a violation of section I of the Sherman Act.¹²³ One commentator has noted, however, that it is unlikely that the plaintiffs will prevail.¹²⁴ Thus, state legislation appears to be the only line of attack available to the exhibitors.

All twenty-four state anti-blind bidding statutes require trade screenings prior to licensing, although a few states allow waiver of this requirement in limited circumstances. For example, in South Carolina the trade screening requirement may be waived if all exhibitors in the county give their written consent.¹²⁵ In New Mexico, the requirement is waived if, within fifteen days of receiving bid invitations, no exhibitor notifies the distributor that he plans to attend the screening.¹²⁶

Additionally, most state statutes regulate bidding procedures. For example, Pennsylvania's statute¹²⁷ specifies the informa-

123. *Id.* Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1976).

124. Note, *supra* note 41, at 1135-36 (discussing Syufy Enterprises v. Columbia Pictures Industries, Inc., No. C-77-0181 (D. Utah filed Aug. 31, 1977) (action by exhibitor against major distributors alleging, *inter alia*, blind bidding as a restraint of trade in violation of the Sherman Act)).

125. S.C. CODE ANN. § 39-5-540 (Law. Co-op. 1985) provides:

If the first run exhibitors within any county in this State desire to waive the provisions of this article for the purpose of blind bidding on a movie to be shown within that county, the exhibitors may waive the provisions and blind bid if all exhibitors within that county who exhibit first run movies agree in writing to such a waiver; and the distributors shall have the right to request waivers for any and all first run exhibitors.

126. N.M. STAT. ANN. § 57-5A-4(D) (Supp. 1983) provides, "If, within fifteen days of the date of transmission of the invitation to bid, no exhibitor has notified the distributor that it will attend the proposed screening, then no trade screening shall be required prior to the acceptance of bids."

127. PA. STAT. ANN. tit. 73, § 203-8 (Purdon Supp. 1985) provides:

(a) *Invitation to bid contents.* — If bids are solicited from exhibitors for the licensing of a feature motion picture within the Commonwealth, then the invitations to bid shall specify the following:

(1) Whether the run for which the bid is being solicited is a first, second or subsequent run; whether the run is an exclusive or nonexclusive run; and the geographic area for the run.

(2) The names of all exhibitors who are being solicited.

(3) The date and hour the invitation to bid expires.

(4) The time, date, name and address of the location where the bids will be opened, which location shall be in the exchange centers of this Commonwealth.

(b) *Trade Screening.* — If the motion picture that is the subject of the bid has not already been trade screened within the exchange centers of this Commonwealth, the distributor soliciting a bid shall include in the invitation to bid, the date, time and location of the trade screening for such a picture.

tion which must be contained in a bid solicitation, requires that all bids be opened simultaneously and in the presence of the exhibitors who submitted bids, and prohibits distributors from licensing by negotiation once bid solicitations have been received and rejected.

Another common provision in anti-blind bidding statutes prohibits or limits advances and guarantees. Some states specify that the awarding of a license cannot be conditioned on guarantees and/or advances.¹²⁸ Other states flatly prohibit advances and guarantees.¹²⁹

(c) *Bid submission and opening.* — All bids shall be submitted in writing and shall be opened at the same time and in the presence of those exhibitors, or their agents, who submitted bids and are present at such time.

(d) *Examination of bids.* — Any exhibitor, or the agent of an exhibitor, who submits a bid for a particular run of a feature motion picture may, at reasonable times within 60 days after a bid is opened, examine any bid that is made for the same run of the motion picture by another exhibitor. The exhibitor may examine the bids even if the distributor rejects all bids that are submitted. Within seven business days after a bid for a particular run of a feature motion picture is accepted, the distributor shall notify in writing each exhibitor who submitted a bid for that run, the terms of the accepted bid and the identity of the successful bidder.

(e) *Rejection of all bids.* — If a distributor issues invitations to bid for a feature motion picture and rejects all bids received, he shall not enter into a license agreement for the exhibition of the picture except by means of the bidding process specified in this section. If the distributor rejects all bids submitted pursuant to the invitation to bid, he shall notify all exhibitors who submitted bids that he rejected all bids and shall issue a new invitation to bid.

128. See, e.g., OHIO REV. CODE ANN. § 1333.06(B) & (C) (Anderson 1979) which provides:

(B) No distributor shall condition the granting or execution of a license agreement on a guarantee of a minimum payment to the distributor, if the exhibitor is required by the license agreement to make any payments to the distributor that are based on the attendance or the box office receipts at a theater at which the motion picture is exhibited.

(C) No distributor shall condition the granting or execution of a license agreement on the exhibitor's advancing, more than fourteen days prior to his first exhibition of a motion picture, any money that is to be used as security for the exhibitor's performance of the license agreement or is to be applied to any payments that the exhibitor is required by the agreement to make to the distributor.

129. See, e.g., PA. STAT. ANN. tit. 73, § 203-5 to -6 (Purdon Supp. 1985) which provide:

§ 203-5. *Guarantees*

(a) *Minimum payment to distributor.* — It shall be unlawful for any license agreement which provides for a fee or other payment to the distributor based in whole or in part on the attendance or box office receipts at a theatre within the Commonwealth to contain or be conditioned upon a guarantee of a minimum payment to the distributor.

(b) *Prohibited guarantees void.* — Any provision, agreement or under-

Finally, Arkansas and Pennsylvania have added clauses which restrict clearances and runs. In Pennsylvania, for example, first runs are limited to forty-two days. After that time, the film must be offered to other second run theaters in the area.¹³⁰

D. Constitutionality

Some distributors have unsuccessfully challenged the constitutionality of these state anti-blind bidding statutes.¹³¹

In these actions, the distributors have argued, first, that the statutes violate the distributors' due process rights under the fourteenth amendment.¹³² Because the states have wide discretion in enacting legislation in furtherance of economic policies,¹³³ and because the anti-blind bidding statutes were arguably enacted for such a purpose,¹³⁴ the due process claim has been rejected.¹³⁵ Second, the plaintiffs have claimed that the statutes deprive distributors of their first amendment right of free speech, applicable to states through the fourteenth

standing which provides for such a guarantee shall be void and purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

§ 203-6. *Advances*

(a) *Advances prohibited.* — It shall be unlawful for any license agreement for the exhibition of a feature motion picture at a theatre within the Commonwealth to contain or be conditioned upon a provision, agreement or understanding that the exhibitor shall advance any funds prior to the exhibition of the picture as security for the performance of the license agreement or to be applied to payments under such an agreement.

(b) *Prohibited advances void.* — Any provision, agreement or understanding which provides for such an advance shall be void and any purported waiver of the prohibition in subsection (a) shall be void and unenforceable.

130. See, e.g., PA. STAT. ANN. tit. 73, § 203-7 (Purdon Supp. 1985) which provides:

No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first run or an exclusive multiple first run for more than 42 days without provision to expand the run to second run or subsequent run theatres within the geographic area and license agreements and prints of said feature motion picture shall be made available by the distributor to those subsequent run theatres that would normally be served on a subsequent run availability.

131. See, e.g., *Associated Film Distribution*, 614 F. Supp. 1100 (D.C. Pa. 1985); *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. 408 (S.D. Ohio 1980); *Paramount Pictures Corp. v. Busbee*, 297 S.E.2d 250 (Ga. 1982) (Weltner, J., dissenting).

132. See, e.g., *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 428.

133. *Id.* (citing *Nebbia v. New York*, 291 U.S. 502, 533 (1934), which held that state legislation is constitutional if it rationally relates to a legitimate governmental objective).

134. *Id.* at 429.

135. *Id.* at 431-32.

amendment,¹³⁶ because the statutes have a "direct and immediate impact" on motion pictures.¹³⁷ There is no question that motion pictures are speech deserving of first amendment protection,¹³⁸ however, since the statutes are content-neutral¹³⁹ and only incidentally affect free speech, they will be upheld whenever there is a valid government interest.¹⁴⁰ The states' economic interest noted above is considered such an interest.¹⁴¹

Likewise, the distributors have failed in asserting their claim that the statutes discriminate against interstate commerce.¹⁴² However, this situation is similar to that addressed in *Exxon Corp. v. Governor of Maryland*,¹⁴³ wherein the United States Supreme Court held that when the legislation in question does not discriminate between in-state and out-of-state companies, it does not violate the commerce clause even if there are no in-state companies which would be affected by the statute.¹⁴⁴ The plaintiffs' other unsuccessful commerce clause arguments have been that the statutes deprive interstate commerce of national uniformity,¹⁴⁵ and are an impermissible burden on interstate commerce.¹⁴⁶

Finally, the courts have rejected claims that the statutes are preempted by the federal copyright laws¹⁴⁷ and that they "sanction and mandate certain collusive conduct which is violative of the federal antitrust laws,"¹⁴⁸ namely exhibitor product splitting and price interference.

136. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

137. *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 432.

138. *Id.*; *Interstate Circuit v. Dallas*, 390 U.S. 676, 682 (1968); *United States v. Paramount, Inc.*, 334 U.S. at 161.

139. *Allied Artists Pictures Corp. v. Rhodes*, 496 F. Supp. at 432.

140. *Id.* at 432 and 433 (discussing *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 (1960), which held that general regulatory statutes which are not intended to control content should be constitutionally upheld when they are supported by valid governmental interests).

141. *Id.* at 435.

142. *Id.* at 437.

143. 437 U.S. 117 (1978).

144. *Id.* at 126.

145. *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 435. *See also* *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

146. *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 438. *See also* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

147. *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 441.

148. *Id.* at 448.

IV

The Impact of Modern Regulations

In assessing the impact of these modern regulations on the motion picture industry, it is instructive to examine the effects on the five distinct interests involved: major distributors, independent distributors, large theater circuits, smaller exhibitors, and the public.

A. Major Distributors

The major distributors argue that the new statutes cause costly delays in the scheduled releases of first-run motion pictures.¹⁴⁹ When pictures can be licensed while still in production, delays in completion rarely affect release dates. However, if a film must be trade screened before it is licensed, the time it takes to set up the screenings and enter into licensing agreements may be enough to push back the release date.¹⁵⁰ When a release date must be pushed back, the film financing interest costs alone can be staggering.¹⁵¹ Distributors also suffer from the loss of effective advertising,¹⁵² the inability to capitalize on the timeliness of a film,¹⁵³ and the loss in revenues if a film is not released during a peak season.¹⁵⁴ As the courts have noted, such delays are rare and are more often caused by problems in completing the picture on time than by the requirements of the statutes, since licensing can be completed very soon after the screening.¹⁵⁵

Distributors also claim that without screen commitments, advertising and promotion are severely hampered.¹⁵⁶ However, while it is true that some types of advertising, such as in-theater trailers and poster boards, will be affected by the statutes, national advertising campaigns will run regardless of the particular theater involved and probably will be sufficient to attract the public's attention.

149. *Associated Film Distribution*, 614 F. Supp. at 1104, 1108; *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 421.

150. Note, *supra* note 41, at 1132.

151. *Supra* note 60; Myers, *supra* note 2, at 282 (the additional annual interest cost on a film released six months late is at least \$15 million).

152. *Associated Film Distribution*, 614 F. Supp. at 1104.

153. *Id.*

154. *Id.*

155. *Id.* at 1108; *Allied Artists Picture Corp. v. Rhodes*, 496 F. Supp. at 421-23.

156. *Associated Film Distribution*, 614 F. Supp. at 1108.

Another problem that distributors face is the cost of trade screening. Because the prints produced for the trade screenings are duplicated from work prints or rough cuts, these prints become worthless after the screening.¹⁵⁷ Each print costs approximately \$1,500.¹⁵⁸ Duping (copying the original work print or rough cut), shipping, and security combine to make the average cost of trade screening a film around \$50,000.¹⁵⁹

Diminished revenues are also a problem for distributors. Distributor income will be reduced by two factors in addition to the losses incurred because of possible delays. First, many distributors will probably opt for negotiation rather than bidding in states which require trade screenings.¹⁶⁰ For example, 20th Century-Fox has decided to negotiate in all states due to the complexities of the various state statutes.¹⁶¹ Distributors generally prefer negotiation when they are faced with an impending release date. Negotiation is quicker and can be completed in a telephone call while bidding may take several weeks. Negotiation is especially preferable if the statute requires rebidding rather than allowing for negotiation if the first round bids are unacceptable.¹⁶²

Since negotiation reduces the effect of free competition in obtaining high licensing terms, the terms may be lower. In Pennsylvania, for example, film rentals received during regulated times were, on the average, four percent lower than during unregulated periods.¹⁶³ Additionally, open bidding provisions may cause an exhibitor to withdraw an exceedingly high bid once he views the competing bids.¹⁶⁴ However, trade screenings and the open bidding procedures may in fact raise the terms on a good film.¹⁶⁵

Second, income may be lost in states which prohibit guarantees. As stated above, approximately one to five percent of a

157. Robbins, *Antiblind-Bid Laws Cause Problems But Distributors Learn to Cope*, *Daily Variety*, July 3, 1985, at 2, col. 3.

158. *Id.*

159. *Id.*

160. Robbins, *supra* note 86; *But see Associated Film Distribution*, 614 F. Supp. at 1112, 1114.

161. *No More Film Bidding For Fox*, *Daily Variety*, Oct. 23, 1985, at 1, col. 4.

162. Telephone interview with Anne Grupp, Esq., *supra* note 13.

163. *Associated Film Distribution*, 614 F. Supp. at 1113 (although the true worth of these figures has been questioned).

164. Myers, *supra* note 2, at 281-82 (describing an instance where an exhibitor submitted three bids and then withdrew the highest).

165. *Associated Film Distribution*, 614 F. Supp. at 1112 n.20.

distributor's income is in the form of unearned guarantees,¹⁶⁶ a source of funds which is regulated in some states.¹⁶⁷

B. Major Exhibitors

While the major distributors are undeniably hurt by anti-blind bidding statutes, large exhibitors are greatly benefited. Most importantly, the statutes protect exhibitors from the distributors' deceptive trade practices.¹⁶⁸ Exhibitors have long argued that bid solicitations are often false and misleading.¹⁶⁹ One such example was the bid solicitation for the film *Best Defense*, which promised a comedy starring Eddie Murphy and Dudley Moore. In fact, no more than twenty minutes of the film featured Eddie Murphy, and he and Dudley Moore were never on the screen together.¹⁷⁰ While state deceptive trade practices laws are available to exhibitors who have been misled,¹⁷¹ exhibitors are reluctant to use them because they fear that distributors will refuse to license films to exhibitors who file such suits. Prevention definitely appears to be the best solution to this problem.

Exhibitors also argue that by seeing a film prior to licensing they can obtain films which are acceptable to their local communities.¹⁷² While this may be true in some suburban and rural areas, an exhibitor will rarely forego the anticipated profits from an expected blockbuster merely because it contains some offensive language or portrayals.

Another advantage the statutes may yield exhibitors is redress of the imbalance in bargaining power which has resulted in lower exhibitor profits.¹⁷³ However, the reasons for this perceived imbalance are disappearing. Generally, it is assumed that a reduction in output of films by the few major distributors causes increased competition between the many exhibitors, thus improving contract terms for distributors.¹⁷⁴ However, recently, the major studios have been increasing their output. In

166. See *supra* notes 52 & 53 and accompanying text.

167. See *supra* notes 128 & 129 and accompanying text.

168. *Associated Film Distribution*, 614 F. Supp. at 1107.

169. See, e.g., NATO Position Paper, *supra* note 109.

170. *Associated Film Distribution*, 614 F. Supp. at 1107.

171. See, e.g., *id.*

172. *Id.*

173. See, e.g., *id.* at 1104.

174. See generally *id.* at 1102-04 (describing the mutual dependence of exhibitors and distributors).

1984, feature film releases in the United States were up thirteen percent over 1983,¹⁷⁵ and 1986 figures were four percent higher than the previous year.¹⁷⁶ Furthermore, 1986 production skyrocketed, with fifty-three percent more pictures put into production than in 1985.¹⁷⁷

Additionally, one might expect competition to be increased by the growth in the number of new screens.¹⁷⁸ This is caused by the exhibitors themselves, especially the large chains.¹⁷⁹ While there are thousands of individual exhibitors nationwide, in any one geographic area relatively few dominate the market.¹⁸⁰ Since these chains generally operate the most sought-after screens, they have as much bargaining power as the distributors. In fact, cities dominated by one large chain place distributors at a total disadvantage in negotiating.¹⁸¹

One definite disadvantage the statutes hold for exhibitors when licensing motion pictures is the inability to evaluate all the upcoming releases at the same time. Some films will be ready for screening before others and, since speed is not necessarily the hallmark of a good film, pictures which are screened early arguably are more likely to be licensed at terms favorable to the distributor. While exhibitors may, theoretically, choose to pass up an early but poor film and wait to view the other upcoming films, economics dictate that they can wait only so long for fear of being "stuck" with an even poorer picture or, even worse, with no picture at all.

C. Independent Distributors

Independent distributors may be put in the toughest position of all. While the courts have suggested that independents will benefit because exhibitors will be judging films based on their true merit,¹⁸² it is equally possible that exhibitors will continue to choose films with major stars or directors over independent

175. Cohn, *U.S. Releases of Feature Pix Up 13% in '84*, *Daily Variety*, Jan. 3, 1985, at 1, col. 4.

176. Cohn, *Distribs Load Up '86 Pipeline*, *Daily Variety*, Dec. 31, 1986, at 1, col. 4.

177. McCarty, *Film Production Soars in '86*, *Daily Variety*, Jan. 5, 1986, at 1 col. 4.

178. *Supra* notes 20 & 21 and accompanying text.

179. *Id.*

180. Plaintiffs' Trial Brief at 17-20, *Associated Film Distribution*.

181. *See generally id.* at 18 (noting that the Cinemette circuit dominates the first-run market in Erie, Pa. and that General Cinema operates most of the first-run theaters in Scranton, Pa.).

182. *See, e.g., Associated Film Distribution*, 614 F. Supp. at 1108.

features by unknown filmmakers, even if the former are of poorer quality. Audiences are attracted to films with big names, especially since the advertising expenditures on these films are far greater. Second, due to the relationships noted above,¹⁸³ an exhibitor may choose to take a major's film over an independent's merely to maintain his relationship with the major and have a better chance at exhibiting the next blockbuster.

For the small distributor, the most burdensome aspect of the legislation is the cost. Independents do not have the ability to absorb the extra costs of trade screening as easily as the majors.¹⁸⁴ To an independent distributor, \$50,000 is a large sum. While the majors have several branch offices across the country to handle distribution,¹⁸⁵ many independents have only one office. It is much more difficult and costly for independents to keep track of the varying statutes, find and rent screening rooms, and secure personnel to run the screening.¹⁸⁶

For the independent distributor, the statutory requirements can often lead to absurd results. For example, a small distributor of religious films may want to license a particular film to church groups in a state with an anti-blind bidding statute. To do so, he must notify all the exhibitors in the area of the screening, rent a screening room, and fly a copy of the film to the screening.¹⁸⁷

D. Independent Exhibitors

For the most part, small exhibitors may benefit in much the same way as larger exhibitors, especially in the states which limit or prohibit advances and guarantees. While a large chain is usually able to advance money to distributors out of its own revenues, a small exhibitor often must take out a loan to compete.¹⁸⁸ And while a chain can usually sustain the losses associated with large guarantees which are not made up by the box office, one such loss may be enough to close down a small theater.¹⁸⁹ However, there are some substantial burdens on the small exhibitor that outweigh the benefits. The increase in the

183. See *supra* notes 92-102 and accompanying text.

184. See generally Plaintiff's Trial Brief at 62, 63, *Associated Film Distribution*.

185. See, e.g., Myers, *supra* note 2, at 276.

186. See *supra* note 184.

187. See Plaintiff's Opening Statement at 39, *Associated Film Distribution*.

188. See *supra* notes 160-61 and accompanying text.

189. *Associated Film Distribution*, 614 F. Supp. at 1109-10.

role and amount of negotiation caused by the statutes¹⁹⁰ also works against the small exhibitor because it enhances the importance of the relationships between the major distributors and large chains. Small exhibitors are rarely, if ever, able to enter into similar arrangements.

E. The Public

Finally, the anti-blind bidding statutes may have some impact on the public. Both courts and commentators claim that high terms and large guarantees and advances drive up box office ticket prices.¹⁹¹ However, since 1967, ticket prices have risen less than prices in general as reflected by the Consumer Price Index,¹⁹² and not nearly as quickly as the cost of making a motion picture.¹⁹³

The courts have also argued that exhibitors hold over bad films in order to recoup large guarantees¹⁹⁴ and that limitations on guarantees "benefit the public by reducing the incentive of exhibitors to play motion pictures beyond their useful life."¹⁹⁵ However, it seems that an exhibitor would rather cut his losses in the best possible way, including substituting a good film for a poor one, in the hope of making up for the lost guarantee with the increased profits on the new film. If this is the case, then the argument can work in the opposite direction: to minimize guarantee losses, an exhibitor will show new releases sooner than if there were no guarantee.

Another argument, unique to Pennsylvania due to its unusual statute, is that the ban on first runs longer than forty-two days enables films to move into suburban areas more quickly.¹⁹⁶ However, since the recent trend on distribution has been to

190. In reality, however, these theaters are not the ones which generally receive licenses on important films commanding high guarantees. Major films are rarely seen in an independent theater because the facilities are generally not comparable to those owned by the chains.

191. *E.g., Associated Film Distribution*, 614 F. Supp. at 1110 n.15; Lazarus, *supra* note 74, at 307.

192. BUREAU OF LABOR STATISTICS, CPI DETAILED REPORT 4, 23 (Dec. 1984).

193. *Industry Economic Review and Audience Profile*, in THE MOVIE BUSINESS BOOK 353 (J. Squire ed. 1983). From 1972 to 1981, the production costs of films made by the major studios rose 475.2%. This figure does not include interest or advertising increases. *Id.*

194. *E.g., Associated Film Distribution*, 614 F. Supp. at 1110.

195. *Id.*

196. *Associated Film Distribution*, 614 F. Supp. at 1112.

open films on more screens in more areas,¹⁹⁷ this provision will probably have little effect.

V

Conclusion

Since the Paramount consent decrees were executed,¹⁹⁸ motion picture licensing has become a complicated and often cut-throat process. Various practices, some of which have been abolished, were and are used by distributors and exhibitors to gain an edge in their dealings with one another.

Distributors have used blind bidding for nearly ten years to minimize the risks inherent in the film industry, arguably at the expense of exhibitors. Major exhibitors have successfully lobbied state legislatures and have been rewarded with anti-blind bidding statutes which benefit them alone. These statutes offer few benefits to the public. Furthermore, modern regulation of blind bidding works to the detriment of not only major distributors, who have adapted, but also independent distributors and small exhibitors, who may not be able to overcome the new burdens imposed on them.

197. Fellman, *supra* note 41, at 314.

198. *See supra* note 1.

